



POLICE DEPARTMENT

June 25, 2018

In the Matter of the Charges and Specifications : Case No. 2016-16407

: - against - :

Sergeant Michael DiCecco :

Tax Registry No. 903799 :

Staten Island Gang Squad :

At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable David S. Weisel
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: Hamilton Lee & Suzanne D. O'Hare, Esqs.
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007

For the Respondent: John D'Alessandro, Esq.
The Quinn Law Firm
399 Knollwood Road, Suite 220
White Plains, NY 10603

To:

HONORABLE JAMES P. O'NEILL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

Charges and Specifications:

1. Sergeant Michael Dicecco, on or about April 21, 2016, at approximately 2300 hours, while assigned to 121 PCT and on duty, in the vicinity of Ann Street and Heberton Avenue, Richmond County, abused his authority as a member of the New York City Police Department, in that he stopped Individual 1 without sufficient legal authority.

P.G. 212-11, Page 4, Paragraph 16 – ABUSE OF AUTHORITY
– AUTHORIZING – STOP

2. Sergeant Michael Dicecco, on or about April 21, 2016, at approximately 2300 hours, while assigned to 121 PCT and on duty, in the vicinity of Ann Street and Heberton Avenue, Richmond County, abused his authority as a member of the New York City Police Department, in that he searched Individual 1 without sufficient legal authority.

P.G. 212-11, Page 5, Paragraph 22 – ABUSE OF AUTHORITY – SEARCH

3. Sergeant Michael Dicecco, on or about April 21, 2016, at approximately 2300 hours, while assigned to 121 PCT and on duty in the vicinity of Ann Street and Heberton Avenue, Richmond County, abused his authority as a member of the New York City Police Department, in that he strip-searched Individual 1 without sufficient legal authority.

P.G. 208-05, Page 2, Paragraph C(1) – ABUSE OF AUTHORITY
– AUTHORIZING – SEARCH
– STRIP SEARCH

4. Sergeant Michael Dicecco, on or about April 21, 2016, at approximately 2300 hours, while assigned to 121 PCT and on duty in the vicinity of Ann Street and Heberton Avenue, Richmond County, used offensive language to Individual 1 based upon her gender, stating in substance, "Why do you have tits for? Is that to hold your dick? Is that to hide your cock?"

P.G. 203-10, Page 1, Paragraph 1 – OFFENSIVE LANGUAGE

5. Sergeant Michael Dicecco, on or about April 21, 2016, at approximately 2300 hours, while assigned to 121 PCT and on duty, in the vicinity of Ann Street and Heberton Avenue, Richmond County, was discourteous to Individual 1, stating in substance, "Why did you change your name? Why are you trying to be a woman? You are still a man. What is the panty for? What's that bulge for? You are still a man."

P.G. 203-09, Page 1, Paragraph 2 – DISCOURTESY

6. Sergeant Michael Dicecco, on or about April 21, 2016, at approximately 2300 hours, while assigned to 121 PCT and on duty in the vicinity of Ann Street and Heberton Avenue, Richmond County, abused his authority as a member of the New York City Police Department, in that he refused to provide his shield number to Individual 1.

P.G. 203-09, Page 1, Paragraph 1 – DISCOURTESY – NAME AND SHIELD

7. Sergeant Michael Dicecco, on or about April 21, 2016, at approximately 2300 hours, while assigned to 121 PCT and on duty in the vicinity of Ann Street and Heberton Avenue, Richmond County, abused his authority as a member of the New York City Police Department, in that he threatened to arrest Individual 1 without sufficient legal authority.

P.G. 208-01, Page 1, Paragraph 3 – LAW OF ARREST

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before the Court on March 28, April 24 and May 10, 2018. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The CCRB called CCRB Investigator Joshua Richardson, Police Officers Gary Leite and Robert Hesterhagen, and Sergeants Anissa Payne and Daniel Tovar as witnesses. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, the Court finds Respondent Not Guilty.

FINDINGS AND ANALYSIS

Introduction

It is undisputed that on April 21, 2016, Respondent was assigned to the 121 Precinct anticrime team as its supervisor. He is charged with wrongfully stopping, searching, and threatening to arrest Individual 1 that evening during a street encounter. Respondent also is accused of being discourteous toward Individual 1, a transgender woman, with offensive remarks about her gender identity and anatomy.

Respondent denied that he had any interaction with Individual 1, much less those charged in the specifications. He asserted that he was at the 121 Precinct stationhouse

The first officer, the driver, was white, 5'8" to 5'9", "clean cut" and had "dirty blonde," "dark blonde," or "light brown" hair. Individual 1 described him as between 26 and 29 years old and weighing between 150 to 160 pounds (Ex. 9, pp. 4, 13-15).

Individual 1 described one of the officers, whom she called "shorty," as white and about 5'6" to 5'7" tall, with "real short spiky ... light brown" hair. This "little short one" had hair that was shorter on the sides and in the back than on top (Ex. 9, pp. 4, 15-16, 29, 40).

The third officer had short black hair and also was 5'8" to 5'9". Individual 1 "guess[ed] he's Hispanic 'cause he was medium complexion." He was no older than 30 (Ex. 9, pp. 4, 17).

Individual 1 stated that the driver asked her where she was coming from. He told her that she was being stopped because "I know you sell heroin out of your house." Individual 1 denied to the officer that she used drugs and maintained she did not affiliate with anyone that did (Ex. 9, pp. 4-5, 13, 18, 28, 34-35).

While the officers searched Individual 1, including several of her pockets, and checked her identification, she showed them the court documentation indicating that she had legally changed her name. The officer with the "dark blonde" hair asked Individual 1 why she had changed her name and what her birth name had been. She answered that "my name is Individual 1" (Ex. 9, pp. 5, 19-20, 23, 25-27).

Individual 1 stated that the officer with dark blonde hair pulled her pants down to her knees. He asked what the bulge was in the back of her underwear. Individual 1 responded that he knew it was her penis. The officer claimed that it was drugs. The officer asked Individual 1, "Why are you trying to be a woman. You're still a man.... Why you got tits for?" (Ex. 9, pp. 6, 23, 25, 29, 37-38, 40).

Individual 1 stated that the dark-blonde-haired officer asked "what is that thing you have on?... Is that to hold your dick" or "hide your cock?" She explained that it was a gaffer (also known as a gaff), a garment that "transgender females wear to hide, you know." He responded, "[O]h, I'm gonna go out and buy me a gaffer" and another officer laughed. The officer with dark blonde hair was "acting like a real faggot. He was shaking his shoulders and shaking his hips from side to side" as if to mock Individual 1 (Ex. 9, pp. 6, 30-32).

The officers checked her for warrants and told her she was free to go, although the dark blonde officer warned, "I know what you're doing, and I will get to the bottom of it.... I'll be watching you." She began walking away, but asked, "[W]hy am I being questioned for? What's the problem?" Individual 1 also asked for his shield number. "[T]he officer" started clicking his handcuffs, which Individual 1 perceived as a threat to arrest her (Ex. 9, pp. 6-7, 21-22, 28-29, 31-32, 44).

Individual 1 stated that she had several interactions in the past with the dark-blonde-haired officer. He would drive slowly past her home. She had brought a CCRB complaint against him in the past but did not pursue it. The officer with the black hair had stopped her in the past as well (Ex. 9, pp. 8-9).

CCRB INVESTIGATOR JOSHUA RICHARDSON indicated at trial that he was the lead investigator for Individual 1's complaint. He interviewed Individual 1 on May 20, 2016. Richardson again interviewed Individual 1 on July 28, 2016, to show her several photo arrays he had developed during the course of the investigation (Tr. 20-23, 51, 54, 70).

Richardson testified that Individual 1 described the officers and recalled the first three letters of their vehicle's license plate, EFP. He requested from the Department a list of any black or dark-colored unmarked sedans "assigned to any NYPD command in Staten Island" with those first letters. The Department responded that vehicle number 165 had that

combination and was assigned to the 121 Precinct. There was another vehicle with those letters assigned to the 121 Precinct Detective Squad. This was the precinct of occurrence for Individual 1's complaint. Richardson conceded that he did not know how far Individual 1 was from the police vehicle when she observed the plate number or how the street lighting was (Tr. 25-26, 42-46, 60-61, 75).

Based on the clothing descriptions, Richardson concluded that the officers were assigned to the anticrime team. Using the roll call for that day, and the physical descriptions given by Individual 1, Richardson selected Respondent and Police Officers Gary Leite, Robert Hesterhagen and John Murphy to be included in photo arrays (Tr. 26-27, 46-48).

Richardson testified that Individual 1 identified Hesterhagen and Respondent in separate photo arrays (Exs. 5 & 7, respective photo arrays). She failed to identify anyone in the photo array containing Murphy (Ex. 6). In the array containing Leite (Ex. 8), Individual 1 identified a filler (Tr. 27-30, 41, 80).

Richardson claimed that it was possible Respondent was between 26 and 29 years old as Individual 1 had described the officer in question. He agreed that Respondent did not have dirty blonde hair as Individual 1 had expressed. Rather, it was salt and pepper, i.e., black and gray. Finally, he weighed around 40 to 50 pounds more than Individual 1 had communicated (Tr. 34, 36-38).

Richardson interviewed Respondent, Leite, Hesterhagen and Murphy as part of the investigation. Murphy stated that he had an arrest around 2115 or 2130 hours. All four officers indicated that they were performing arrest processing at the 121 Precinct at the time of the reported incident. Leite and Hesterhagen agreed that they returned to patrol at

some point, but they did not recall when this would have occurred (Tr. 63-67, 69-71, 75-76).

Richardson was aware of prior CCRB complaints by Individual 1, as she had mentioned that she made complaints about the dirty-blonde-haired officer in the past. Richardson cross-referenced these prior complaints to see if they had any relevance, but he maintained that they did not (Tr. 79).

POLICE OFFICER GARY LEITE testified that he was assigned to the 121 Precinct anticrime team on the evening of April 21, 2016. He was assigned to car number 165 with Respondent and Hesterhagen. Murphy and now-Detective Leonid Shatkin were in another vehicle. Leite testified that while it is possible in general for anticrime members to switch vehicles during a tour, he did not do so that night. Leite denied having any contact with Individual 1 that night (Tr. 84-86, 88-89, 97, 103-04, 106).

Leite testified that he assisted on an arrest around 2100 hours that evening. Murphy was the arresting officer. The entire anticrime team was present at the scene of the arrest. Leite maintained that the entire team returned to the stationhouse for arrest processing and did not return to patrol until after midnight, perhaps 0030 hours. Leite wrote the arrest report. Respondent and Hesterhagen returned to patrol with him. Murphy remained at the precinct. Respondent had to sign off on the evidence voucher. The drugs and weapons had to be invoiced separately (Tr. 86-88, 90-92, 94-95, 100, 105).

Leite maintained that when there was an anticrime arrest, they "do the arrest as a team." Everyone helped do the arrest paperwork and vouchering of evidence. To go back out on patrol and leave the arresting officer to do all the processing would not be "fair." The sergeant was "[a]bsolutely not" allowed to leave during arrest processing because "he

is the boss. He's in charge." Not "[u]nder any circumstances" would anyone be allowed back on patrol until that occurred (Tr. 89-92, 95-96).

Leite agreed that his memo book indicated he was present for duty at 1930, and inspected vehicle number 165 at 2125. At 2130, he wrote '98,' indicating that he was out on patrol. There was no entry concerning the arrest. Leite did not know when on the memo book he would have listed the arrest (Tr. 101-03).

POLICE OFFICER ROBERT HESTERHAGEN testified that he worked on April 21, 2016, from 1930 to 0405 hours in the 121 Precinct. He was on the anticrime team in car number 165 with Respondent and Leite (Tr. 122, 127).

Hesterhagen testified that he assisted on an arrest made by Murphy. Hesterhagen believed, but was not one hundred percent certain, that after the arrest processing was complete, he returned to patrol with Respondent and Leite. He did not recall what time this was (Tr. 123-24, 130-31).

Hesterhagen's memo book (Ex. 4) indicated the arrest by Murphy at 2118 hours. The next entry was at 0300 and read "62A," meaning administrative time in the stationhouse, not necessarily related to any arrest. Hesterhagen could not explain why he did not place his return to patrol in his memo book (Tr. 128-30).

Hesterhagen maintained that when their team made an arrest, the entire team returned to the station house. Respondent, as the supervisor, had a policy that no one could return to patrol until all arrest processing was completed (Tr. 124-28).

SERGEANT DANIEL TOVAR was assigned as the first platoon desk officer at the 121 Precinct on April 22, 2016. His tour began at 2305 hours on April 21, 2016 (Tr. 163-64).

Tovar testified that the daily vehicle assignment sheet generally was filled out by the patrol supervisor's operator, but it could be done by any police officer. It listed all vehicles

assigned to the 121 Precinct, excluding the 121 Detective Squad. For the first platoon, it should be done around 2300 to 2315 hours, but there was no set time. The notation "S/H" referred to "stationhouse," meaning the vehicle was at the stationhouse when the officer checked for it. Tovar himself also verified these forms. The sheet he verified for April 22, 2016 (CCRB Ex. 10), indicated that car number 165, license plate EFP 4687, was parked at the stationhouse at the beginning of the first platoon, i.e., 2300 to 2315 hours on April 21, 2016 (Tr. 165-68).

RESPONDENT was assigned as the anticrime supervisor in the 121 Precinct on April 21, 2016. He was working in plainclothes and in unmarked vehicle number 165, a dark Impala. Respondent was the driver, with Leite and Hesterhagen in the car. Respondent was 47 years old, was 5'10" in height, weighed 195 pounds, and had salt and pepper hair that was longer on the top and shaved on the sides. Other than his age, these descriptors were the same as they were in 2016 (Tr. 171, 176-77, 188-89).

Respondent denied having any contact with Individual 1 on the night of the incident or at any other time. Based on the photograph he had been shown at his CCRB interview, Respondent testified at trial that he had seen Individual 1 in the past, but not recent to April 21, 2016, while performing enforcement in the vicinity of Ann Street and Heberton Avenue. That vicinity was an approximately 15- to 20-minute drive to the 121 Precinct stationhouse at a normal rate of speed (Tr. 172, 182-83).

Respondent testified that at approximately 2300 hours on April 21, 2016, he was at the stationhouse supervising an earlier arrest for criminal possession of a controlled substance and criminal possession of a weapon. The complaint report and arrest report, for an individual named [REDACTED] introduced into evidence as Respondent's Exhibit A, listed the time of the stop as 2110 and the time of arrest as 2118 on April 21,

2016. After searching the arrestee at the scene, they arrived at the stationhouse at 2150 hours (Tr. 172-73, 177-80, 183-84).

Respondent testified that he had several responsibilities overseeing an arrest while at the precinct. This included entering the arrestee's pedigree information into the command log, supervising the search of the prisoner, verifying the chain of custody of any seized property, verifying that the information in the complaint report and arrest report was accurate, and supervising the fingerprinting of the prisoner, any phone calls or bathroom visits, prisoner transport, and the arrestee's overall care. Arrest processing could take four to five hours (Tr. 174-75).

It was Respondent's policy that all members of the anticrime team were to remain at the stationhouse during arrest processing, although this was not required by the Department (Tr. 176).

Respondent wrote "62A" in his memo book at 2130 hours, indicating that "we went administrative" to handle the arrest. Other than his inspection by a lieutenant, that was Respondent's final memo book entry until he went end of tour at 0409 the next day (CCRB Ex. 2; Tr. 185-87).

The final document that Respondent signed to approve as part of the arrest processing that night was the Property Clerk Invoice in the Property and Evidence Tracking System (Respt. Ex. B). This was time-stamped at 0027 hours, April 22, 2016. Respondent had to use his personal username and password to enter his signature in the system. Although he was aware that some members of the service shared passwords to expedite vouchering, Respondent noted this violated Department procedure and denied having done so (Tr. 175, 187-88).

Analysis

In order to prove their case, the CCRB first was required to prove by a preponderance of the evidence that Respondent was present at the scene with Individual 1. The Court finds that the CCRB failed to do so.

First, while identity is the primary defense in this case, it still must be noted that the CCRB relied almost solely on Individual 1's out-of-court statements to prove these specifications. Her identifications in the photo arrays are still hearsay. Cf. People v. Andrade, 87 A.D.3d 160, 163-65 (1st Dept. 2011) (introduction of photo array shown to defendant during police questioning did not violate hearsay rule because it was introduced not for the truth of the matter asserted, but to show the voluntariness of defendant's statements).

Although hearsay is admissible in this forum, see Matter of Ayala, v. Ward, 170 A.D.2d 235 (1st Dept. 1991), there are significant reasons for caution in cases like this that present close questions of credibility. The hearsay is central to the CCRB's case, so there is a question of basic fairness in using the hearsay to reach a finding of fact. See Case No. 77005/01, p. 6 (May 27, 2002) (hearsay declarations are insufficient to support findings of guilt in cases that pose close questions of credibility).

The strongest evidence in the CCRB's favor is Individual 1's description of the police and her selections in the photo arrays. Individual 1 described the vehicle as a dark-colored Impala with the first three letters of the license plate being EFP. This was consistent with car number 165 assigned to the 121 Precinct, as indicated on the daily vehicle assignment sheet. It was undisputed that Respondent, Leite and Hesterhagen were operating in car 165 on the night in question.

It also was revealed, however, that this assignment sheet applied to vehicles assigned to patrol functions only. The 121 Precinct Detective Squad also had a vehicle with EFP as the first three letters. The CCRB investigator requested information from the Department only for vehicles assigned to Staten Island commands. There was no evidence excluding vehicles from other citywide commands that could have been operating within the confines of the 121 Precinct and that could have made a street stop of Individual1. Cf. *Case Nos. 2013-10275 & -277*, p. 6 (Jan. 7, 2016) (specific questioning from officers indicated that they believed they had seen hand-to-hand drug exchange between vehicle driver and passenger; this was consistent with the street narcotics enforcement unit to which the accused officers were assigned, but inconsistent with vice or auto crime). Finally, Individual 1 was not asked any questions at her interview about lighting conditions, distance from which she viewed the license plate, or the state of her eyesight ability.

Individual 1 identified Respondent and Hesterhagen in separate photo arrays, but identified a filler in the photo array containing Leite. Individual 1, however, also originally described the suspect officer in a way that varied greatly from Respondent's actual appearance. Individual 1 described the suspect officer as being 26 to 29 years old, with dark blonde or dirty blonde hair. This was about 20 years younger than Respondent's actual age and appearance at trial, and deviated significantly from his salt and pepper hair.

In fact, Respondent had an unusual hairstyle in which he had longer hair on top, while it was shaved on the sides and back. The longer hair was brown, not blonde, and the sides and back were salt and pepper. One would expect a witness who purportedly described Respondent in detail as to height, hair color, age and race to have noticed this. Cf. *People v. Meyers*, 112 A.D.3d 516 (1st Dept. 2013) (victim had ample opportunity to

observe defendant, and his accurate description of defendant's unusual hairstyle "far

outweighed" any supposed deficiencies in the description). It also should be noted that no evidence was provided as to the date of Respondent's photograph in the photo array. It could have been taken several years ago, when Respondent either was promoted or received a new Department identification card. The CCRB never demonstrated that it accurately reflected Respondent's appearance as of April 21, 2016.

In sum, Individual 1's inability to describe the suspect accurately makes it difficult for the Court to rely on her identification of Respondent in the photo array. Cf. People v. Huertas, 75 N.Y.2d 487, 493 (1990) (factfinder may compare the verbal description, "made on the basis of recollection alone, close to the time of the" incident, with "the actual features of the person later" identified, in order to evaluate the degree to which the later identification might have been "the product of intervening memory failure or suggestion.").

Individual 1 also described one of the officers with Respondent as having "real short spiky . . . light brown" hair. Neither Leite nor Hesterhagen had such a hairstyle. Additionally, the filler Individual 1 chose in the array containing Leite looks significantly different from Leite's actual appearance.

There were other instances that give the tribunal pause in crediting Individual 1's identification. Individual 1 disparagingly harped during the interview on the apparently inadequate height of one of the officers, whom she called "shorty" because he was merely 5'6" to 5'7" tall. She also described the hairstyle of the "little short one."

Individual 1 also made a comment in her interview that the officer told her she was being "a smart ass." When Individual 2, the investigator, asked her about it a little over 20 minutes later, Individual 1 denied having made this remark. Individual 2 said that she had written it down in her notes but admitted she might have misheard (Tr. 5, 28). The transcriptionist, however,

obviously heard it and the audio recording of the interview confirms that Individual 1 said it (audio at 04:50).

Respondent and his fellow anticrime team members asserted that all five members of the anticrime team remained at the stationhouse during the entirety of Gelzer's arrest processing, which ended at the earliest with the completion of the vouchering of his property at 0027 hours on April 22, 2016. It should not have taken five people to process a relatively simple arrest involving a knife and a small enough amount of narcotics to be held on the person. Still, the witnesses admitted that it was Respondent's policy, not a Patrol Guide imperative, that all had to remain. No evidence was presented that contradicted Respondent's testimony about his policy.

Leite prepared the complaint report and arrest report, but he noted in his memo book that he was on patrol around 2130 hours, and thus not in the stationhouse. On the other hand, he indicated on the complaint report that the crime was reported at 2135 hours. He also did not indicate in his memo book that he was on patrol to begin with until 2125. Thus, not much concrete timing can be gleaned from Leite's memo book.

Perhaps the strongest evidence casting doubt on the idea that car number 165 could have been on patrol around 2300 hours on April 21, 2016, was the daily vehicle assignment sheet. The anticrime officers involved here were not working a strict platoon-based tour. Their tour began at approximately 1900 hours and ended at approximately 0300 to 0400 hours. The vehicle sheet, however, indicated that car number 165 was parked at the stationhouse at the beginning of the first platoon for April 22, 2016, meaning around 2300 to 2315 hours on April 21, 2016. This was the time that Individual 1 asserted Respondent interacted with her. On this basis, it is difficult for the Court to conclude that the vehicle

was anywhere other than the precinct at the time the CCRB argues it was with Individual 1 at Ann Street and Heberton Avenue.

It is possible that the Court could have reached a different conclusion had Individual 1 testified. She could have resolved many inconsistencies about her testimony, especially those concerning her description and identification of Respondent. Had the CCRB timely attempted to obtain automatic vehicle location information for car number 165, it is possible that a specific location for the vehicle at 2300 hours on April 21, 2016, could have been obtained. Nothing of note was adduced about the supposed prior CCRB complaints, which could have indicated that Individual 1 had identified Respondent accurately in the past and knew what he looked like. The CCRB investigator merely testified that they had no relevance to the current incident (Tr. 79).

In any event, on the evidence presented, the Court finds that the CCRB failed to prove by a preponderance of the evidence that Respondent was the officer that interacted with Individual 1 and allegedly took the offensive actions and made the offensive statements. Therefore, the Court finds Respondent Not Guilty.

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner Trials